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No. 03-484

In The
Supreme Court of the United States
October Term, 2003

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, et al.,

Respondents.

On Petition for Writ of Certiorari to the Fifth District Court of Appeal, State of Florida

BRIEF IN OPPOSITION BY THE STATE OF FLORIDA

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ARGUMENT

I. CAMPUS COMMUNICATIONS' ARGUMENTS WERE NOT PROPERLY PRESENTED TO NOR DECIDED BY THE FIFTH DISTRICT COURT OF APPEAL.

Campus Communications' entire petition is premised upon a contention that Section 406.135, Florida Statutes, violates the right to free speech under the First Amendment, made applicable to the states by the Fourteenth Amendment. The State concurs with and adopts the argument in the brief in opposition by Respondents Teresa Earnhardt, et al. that Campus Communications failed to properly preserve this argument below.

Campus Communications did not present any federal constitutional issues for review in its briefs before the Fifth District Court of Appeal. *See* Fla. R. App. P. 9.210(b)(1) (issues presented for review shall be identified in table of contents). Its only reference to the First and Fourteenth Amendments is in a footnote. (Initial Brief at 25 n.13). Although the State's answer brief asserted that Campus Communications had not properly presented for review any arguments based on the U. S. Constitution (State's Answer Brief at 29-30), Campus Communications failed to respond to this argument in its reply brief. The Fifth District's opinion is silent on the constitutionality of the Section 406.135 under the First and Fourteenth Amendments. *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002). Campus Communications did not raise any federal constitutional claims in its briefs filed with the Florida Supreme Court.

Because the entire argument upon which Campus Communications's petition rests was neither properly presented to nor decided by the Fifth District Court of Appeal, this

argument is not a proper ground for granting the petition for certiorari. *See* 28 U.S.C. § 1257(a) (writ of certiorari appropriate when validity of state statute is "drawn in question" on the ground that it is repugnant to the Constitution); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (Court will not consider federal claim that was not address by or properly presented to state court that rendered decision sought to be reviewed); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (same). As this Court has recognized, it would be "unseemly" to disturb the finality of the decision by the Fifth District Court of Appeal on a federal ground that the state court did not have occasion to consider. *See Adams*, 520 U.S. at 90. The petition should be denied on this basis.

II. SECTION 406.135 IS CONSTITUTIONAL AS APPLIED TO CAMPUS COMMUNICATIONS' REQUEST TO OBTAIN THE AUTOPSY PHOTOGRAPHS.

Campus Communications' petition also fails on the merits. In its "as-applied" challenge, Campus Communications essentially argues that it was denied access to the autopsy photographs of Mr. Earnhardt because it sought the photographs to evaluate the performance of a private entity (NASCAR), rather than to evaluate the performance of government, and that this ground for denying access constituted viewpoint discrimination in violation of the First Amendment. According to Campus Communications, this application of the "good cause" analysis in Section 406.135 impermissibly required Campus Communications to surrender its constitutional right to free speech in order to obtain access to the autopsy photographs, and thus violated the "unconstitutional conditions doctrine." No authority exists for this contention.

Campus Communications' reliance upon *Los Angeles Police Department v. United Reporting*, 528 U.S. 32 (1999) ("*LAPD*"),

is entirely misplaced. The majority opinion in *LAPD*, joined by seven members of the Court, did not even mention viewpoint discrimination or the unconstitutional conditions doctrine. Therefore, this Court should reject on its face Campus Communications' claim that the Fifth District's decision below is "in derogation of" the Court's decision in *LAPD* on these points. Although both concurring opinions in *LAPD* acknowledged the legal principle that a government may not limit access to information based upon viewpoint, one concurring opinion found the principle inapplicable and the other found that the statute in question did not violate it. 528 U.S. at 42, 43. Only the dissenting justices believed that the challenged statute improperly discriminated against disfavored speech. *Id.* at 45-48. Conflict with a dissenting opinion of this Court is not a proper basis for granting a writ of certiorari.

Nor do the decisions of this Court that apply the unconstitutional conditions doctrine suggest that the good cause analysis in Section 406.135 violates the First Amendment. This doctrine holds that the "government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech." *E.g.*, *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Thus, where government makes a benefit widely available, but limits the access of a small group based upon the viewpoint of that group's speech, the government's action violates the First Amendment. *See Good News Club v. Milford*, 533 U.S. 98, 107-12 (2001) (school board's refusal to allow group to use facility to teach children morals and character development from a Christian perspective constituted impermissible viewpoint discrimination); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-37 (1995) (university guideline that refused to pay for printing costs for group that promoted belief in a particular deity was unconstitutional viewpoint discrimination). On the other hand, where the challenged regulation does not seek to control any First Amendment activity, the regulation is

permissible. *See Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983) (IRS provision that declined tax-exempt status to organizations that engage in lobbying did not violate First Amendment because it did not prevent organization from lobbying but merely refused to pay for the lobbying with public money).

The denial of Campus Communications' request to view the autopsy photographs of Mr. Earnhardt based upon Section 406.125 does not impose any restrictions or regulations upon Campus Communications' speech. Nothing in Section 406.135 expressly or impliedly restricts Campus Communications' ability to write about NASCAR safety; it simply does not provide Campus Communications access to confidential documents in order to do so. A restriction on access to information is not equivalent to a restriction on speech. *See Houchins v. KQED*, 438 U.S. 1, 9 (1978). Because there is no constitutional right to information in the government's possession, denial of access to such information does not violate the First Amendment.

The Sixth Circuit recently considered a similar challenge to a Kentucky statute which exempted accident reports from public disclosure except to persons related to those involved in the accident and to news-gathering organizations. *See Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003), *pet. for cert. filed*, Case No. 03-498 (Sept. 30, 2003). The plaintiffs in that case, attorneys and chiropractors who desired to use the accident reports to market their services, brought an as-applied challenge claiming the exemption restricted their First Amendment right to communicate with prospective clients. *Id.* at 824. The Sixth Circuit concluded the statute did not restrict or even regulate the plaintiffs' expression, but rather simply restricted access to confidential information possessed by the government. *Id.* at 827. The court rejected the plaintiffs' argument that the unconstitutional conditions doctrine applied, because the statute did not condition the disclosure of accident reports to the

plaintiffs on the nature of their speech. *Id.* at 828. So too in this case, Section 406.135 merely restricts access to information in the hands of the government, and in no way restricts Campus Communications from speaking from any particular viewpoint. Therefore, Section 406.135 is constitutional as applied to Campus Communications.

As the final argument in support of its as-applied challenge, Campus Communications asserts that Section 406.135 is subject to strict scrutiny and fails such scrutiny because it is not supported by a compelling interest. (Pet. at 20-21). This contention is necessarily premised upon Campus Communications' initial argument that the statute infringes its constitutional right to free speech. This argument fails because, as demonstrated above, Section 406.135 does not implicate any First Amendment right. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (law that does not burden a fundamental right or target a suspect class is subject to rational basis scrutiny). Campus Communications does not contend that the statute is not rationally related to a legitimate government purpose.

Campus Communications seems to suggest that this Court should accept review in this case as an opportunity to clarify the standard of review that was the subject of disagreement in *United States v. American Library Ass'n*, – U.S. – , 123 S. Ct. 2297 (2003). (Pet. at 19-20). Even if the government regulation in *American Library* was comparable to the regulation challenged in the present case, which it is not, *American Library* provides no support for Campus Communications' assertion that Section 406.135 is subject to strict scrutiny. As Campus Communications acknowledges in its petition, a majority of justices in *American Library* found that the statute in that case was *not* subject to strict scrutiny. 123 S. Ct. 2298, 2310.

In sum, none of Campus Communications' as-applied challenges to the constitutionality of Section 406.135 provide any basis for certiorari. The petition should be denied.

III. SECTION 406.135 IS NOT SUBJECT TO A FACIAL OVERBREADTH CHALLENGE AS IT DOES NOT RESTRICT A FIRST AMENDMENT RIGHT.

Campus Communications also contends that Section 406.135 is facially overbroad. This argument is foreclosed by this Court's decision in *LAPD*.

In *LAPD*, a California statute permitted disclosure of addresses of arrested individuals only when the requester declared under penalty of perjury that the request was made for a scholarly, journalistic, political, government, or professional investigative purpose, and that the requester would not use the information to sell a product or service. 528 U.S. at 35. A private publishing service that sought to sell arrestee address information to attorneys and other buyers challenged this provision on First Amendment grounds. *Id.* at 34. Although the publishing service had not attempted to obtain address information by the means provided in the statute, it asserted that the statute was facially unconstitutional in its application to others. *Id.* at 36, 37-38.

The Court held that the publishing service could not bring a facial overbreadth challenge to the statute based upon how the statute might apply to others not before the court. *Id.* at 38. This was because constitutional rights are personal in nature and as a general rule, courts will only adjudicate constitutional challenges based on the factual situation before them. *Id.* at 39. The Court acknowledged the narrow exception to this general rule for statutes that regulate or proscribe speech, but held that

California's limit upon access to arrestee address information did not fall within this exception. *Id.* at 38, 40. By limiting access to arrestee's address information except for specified purposes, the Court said, the government was not prohibiting a speaker from conveying information already in the speaker's possession or in the public domain. *Id.* at 40; *see also id.* at 43 (Ginsburg, J., concurring). The statute merely imposed requirements for obtaining address information from the government, which information the government was free to withhold altogether. *Id.* at 40. Thus, there was no possibility that protected speech would be muted, and a facial challenge was not warranted. *Id.* at 40, 41.

Based upon its holding in *LAPD*, the Court also vacated a decision by the Sixth Circuit that had allowed attorneys and chiropractors to challenge a Kentucky statute on the grounds that it limited the rights of others not before the court to use information contained in accident reports. *See McClure v. Amelkin*, 528 U.S. 1059 (1999), *vacating* 168 F.3d 893 (6th Cir. 1999). On remand, the Sixth Circuit held that the statute was not subject to such a facial challenge because, like the statute in *LAPD*, it did not restrict expressive speech but simply regulated access to information in the government's possession. *Amelkin v. McClure*, 205 F.3d 293 (6th Cir. 2000). This Court denied certiorari. 531 U.S. 871 (2000).

For purposes of a facial constitutional analysis, the statutes challenged in *LAPD* and *Amelkin* are indistinguishable from the statute at issue in this case. Like the California and Kentucky statutes, Section 406.135 does not regulate or proscribe speech and does not prohibit the communication of information. Section 406.135 poses no possibility that protected speech will be muted, and therefore there is no need to resort to a facial challenge. Accordingly, Campus Communications' attempted facial overbreadth challenge based upon various hypothetical situations not before the court, such as a requester's prior

publications and a requester's unwillingness to reveal a government investigation, fails just as the facial challenges in *LAPD* and *Amelkin* failed.

In light of these precedents, Section 406.135 is not subject to a facial overbreadth challenge because it does not limit protected speech. Campus Communications' petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, Campus Communications' petition for certiorari should be denied.

Respectfully Submitted,

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